FILED
JAN 31 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1065

JOSEPH A. MALONEY, d/b/a
THE APALACHICOLA TIMES,
Petitioner,

vs.

B. ROY GIBSON, JR., and ST. JOSEPH TELEPHONE
AND TELEGRAPH COMPANY, a corporation,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Florida and District Court of Appeal of Florida, First District

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MIAMI REVIEW — 371-4853 — 377-3721

TABLE OF CONTENTS

Page

OPINIONS BELOW 2

QUESTIONS PRESENTED

ONE

DOES THE OPINION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT, REVERSING THE JUDGMENT OF THE CIRCUIT COURT AND REMANDING THE CAUSE WITH DIRECTIONS TO ENTER JUDGMENT IN FAVOR OF THESE RESPONDENTS DECIDE A SUBSTANTIAL FEDERAL QUESTION IN A MANNER NOT IN ACCORD WITH PRIOR DECISIONS OF THIS COURT? 3

TWO

DOES THE OPINION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT, MISINTERPRET AND MISAPPLY THE DECISIONS OF THIS COURT IN NEW YORK TIMES v. SULLIVAN, 84 S.CT. 710, AND ROSENBLOOM v. METROMEDIA, 403 U.S. 29· 91 S.CT. 1811, AND THEREBY DENY PETITIONER HIS RIGHTS UNDER THE FOURTEENTH AND SEVENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES? 3

TABLE OF CONTENTS (cont.)

	Page
STATUTES AND RULES INVOLVED	4
CONSTITUTIONAL PROVISIONS INVOLVED	5
STATEMENT OF THE CASE	6
STAGE OF PROCEEDINGS WHERE FEDERAL QUESTION FIRST RAISED	10
REASONS FOR GRANTING THE WRIT	11
CONCLUSION	19
CERTIFICATE OF SERVICE	20

CITATIONS

Case	Page
Catlin v. United States, 324 U.S. 229, 233	7
C. R. Grove, et al. v. Dun & Bradstreet, Inc., CCA 10, 1971 448 F.2d 647	17
Garrison v. Louisiana, 379 U.S. 664	8, 16
Gibson v. Maloney, Fla.App. 1968, 214 So.2d 89	6
Gibson v. Maloney, Fla. 1970, 231 So.2d 823	6
Gibson v. Maloney, Fla.App. 1972, 263 So.2d 632	7
Gillespie v. U.S. Steel Corp., 1964, 379 U.S. 148	7
Kansas Electric Supply Company v. Dun & Bradstreet, Inc. (CCA 10, 1971) 448 F.2d 647	16
New York Times v. Sullivan, 376 U.S. 254	3, 8, 9, 11
Rosenbloom v. Metromedia, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed 2d 296	3, 8, 9, 11, 15
St. Amath v. Thompson, 390 U.S. 727, 20 L.Ed 2d 262	8

CITATIONS (cont.)

OTHERS

	Page
UNITED STATES CONSTITUTION:	
First Amendment	5
Seventh Amendment	5
Fourteenth Amendment, Section 1	5
Supreme Court Rule 19 (1) (a)	2, 4
28 U.S.C., Sec. 1257 (3)	2
9 Moore's Federal Practice, Section 110.08	7

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Petitioner prays a Writ of Certiorari issue to review the Judgment and Opinion of the District Court of Appeal of Florida, entered in the above-entitled cause on June 13, 1972. (App. C) Petition for Rehearing was denied by that court by Order entered July 10, 1972. (App. D)

Petition for Writ of Certiorari was directed to the Supreme Court of the State of Florida on August 8, 1972, and that court by Order filed November 7, 1972, denied the Petition for Writ of Certiorari. (App. A)

OPINIONS BELOW

The Opinion of the District Court of Appeal of Florida, First District, to which this Petition is directed, is reported in 263 So.2d 632. This Opinion *in toto* appears as Appendix A to this Petition for Writ of Certiorari.

Order denying a Petition for Rehearing addressed to this Opinion was filed July 10, 1972. This Petition appears as Appendix B to this Petition. (App. 3)

This Petition was denied by the Supreme Court of Florida by Order entered November 7, 1972. This Order appears as Appendix A to this Petition. (App. 1)

JURISDICTION

The Order of the Supreme Court of Florida denying the Writ of Certiorari to be directed to the District Court of Appeal of Florida, First District, was filed November 7, 1972. (App. A)

The jurisdiction of this court is invoked under and pursuant to the provisions of 28 U.S.C., Sec. 1257(3) and Rule 19(1)(a), Supreme Court Rules.

The Writ of Certiorari is to be directed to the District Court of Appeal of Florida, First District, whose opinion is actually the one sought to be quashed. The Supreme Court of Florida, who earlier had issued an Opinion (231 So.2d 823) quashing a prior Opinion of the District Court (214 So.2d 89) affirming a verdict for this Petitioner, refused to review the instant opinion of the District Court (App. A) by Order filed November 7, 1972.

QUESTIONS PRESENTED

ONE

DOES THE OPINION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT, REVERSING THE JUDGMENT OF THE CIRCUIT COURT AND REMANDING THE CAUSE WITH DIRECTIONS TO ENTER JUDGMENT IN FAVOR OF THESE RESPONDENTS DECIDE A SUBSTANTIAL FEDERAL QUESTION IN A MANNER NOT IN ACCORD WITH PRIOR DECISIONS OF THIS COURT?

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STATUTES AND RULES INVOLVED

Rule 19, Supreme Court Rules, particularly Section 1(a), reads as follows:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> > "(a) *Where a state court has decided a federal question of substance* not theretofore determined by this court or has decided it *in a way probably not in accord with applicable* decisions of this court." (Emphasis Supplied)

28 USCA, Sec. 1257(3), provides:

> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment, Section 1, to the Constitution of the United States reads as follows:

> "1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Seventh Amendment to the Constitution of the United States reads as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

Petitioner was the original Plaintiff in a libel and slander action filed in the Circuit Court of Franklin County, Florida.

A Judgment was entered after the first trial based upon a jury verdict awarding Petitioner $10,000 compensatory damages and $5,000 punitive damages. (App. C, App. 13, 14)

The District Court of Appeal of Florida, First District considered that Judgment on appeal by these Respondents and affirmed the Judgment awarding both compensatory and punitive damages. (*Gibson v. Maloney*, Fla. App. 1968, 214 So.2d 89)

The Supreme Court of Florida then granted certiorari and quashed the Opinion of the District Court of Appeal remanding the cause to that court with instructions to further remand the cause to the trial court for a new trial upon proper instructions on the law. (*Gibson v. Maloney*, Fla. 1970, 231 So.2d 823)

A second trial was held in the Circuit Court of Franklin County in January, 1971. This resulted in a mistrial when the jury was unable to agree on a verdict.

In May, 1971, a third trial was held which resulted in a verdict and judgment against both Respondents for $5,000 compensatory damages and $20,000 punitive damages against the corporate Respondent. (App. C, App. 13)

That verdict and judgment of the Circuit Court was then again appealed to the District Court of Appeal of Florida, First District, by these Respondents and that court on June 13, 1972, entered its Opinion reversing the trial court and remanding the cause to the trial court with *"directions to enter judgment in favor of the Appellants."* (*Gibson v. Maloney*, Fla.App. 1972, 263 So.2d 632) (App. C, App. 13-24)

Petitioner then sought certiorari from the Supreme Court of Florida to review the Opinion of the District Court of Appeal and certiorari was denied by Order of the Supreme Court filed November 7, 1972. (App. A, App. 1, 2)

The only judicial labor left to be performed under the decision, review of which is sought here, is the ministerial act of the trial court's entering a judgment for these Respondents, the original Defendants below, in accordance with the mandate and directions of the District Court of Appeal.

This renders the matter a "Final Judgment" within the meaning of that term as used by this court in considerations of matters which are subject to review by certiorari. (*Catlin v. United States*, 324 U.S. 229, 233; *Gillespie v. U. S. Steel Corp.*, 1964, 379 U.S. 148; 9 Moore's Federal Practice, Section 110.08, Pgs. 111-118)

The basis for the decision, review of which is now sought, was the District Court of Appeal of Florida's interpretation and application of the opinions of this court construing state laws of libel and slander in light of the

restrictions placed upon such laws by the constitutional guarantees contained in the First, Seventh and Fourteenth Amendments to the United States Constitution in cases involving "public officials" or "public figures".

Particularly, the District Court in its Opinion considered and applied its interpretation of the Opinions in the cases of

ROSENBLOOM V. METROMEDIA
403 U.S. 29, 91 S.Ct. 1811,
29 L.Ed 2d 296,

ST. AMATH V. THOMPSON
390 U.S. 727, 20 L. Ed 2d 262

GARRISON V. LOUISIANA
379 U.S. 664, and

NEW YORK TIMES V. SULLIVAN
376 U.S. 254

These federal decisions were the basis for the District Court's holding in this cause.

The District Court of Appeal prospectively explained its apparent contradictory position in reversing the verdict and judgment for this Petitioner coming out of the third trial of this matter after having previously affirmed the verdict and judgment on the original trial by relying upon the Opinion of this court in *Rosenbloom v. Metromedia*, supra, and explaining:

• • • "We hasten to add that the entire field of libel actions has recently undergone a significant change as to governing principles. Some of these changes have taken place subsequent to the trial in the case at bar. Accordingly, although we must apply new principles which have evolved during this appeal, we think it only fair to observe that in large measure the judgment now under review must be reversed by reasons of changes in the law of libel occurring after the entry of the final judgment and, of course, of which the trial court was unaware." (App. C, App. 19)

The District Court concluded *as a matter of law*, contrary to the prior determinations of two juries before whom the case had been tried, the libel complained of in this instance did not constitute *"actionable libel"* under the decisions of this court in *St. Amant v. Thompson*, supra, *New York Times v. Sullivan*, supra, and *Rosenbloom v. Metromedia*, supra.

The dissenting opinion by one of the three judges of the District Court of Appeal concurred in the matter of the reversal of the particular jury verdict and judgment based thereon by reason of improper charges as to the law applicable in the instance of public figures but *dissented from that portion of the Opinion which directed the trial court to enter a judgment in favor of these Appellants.* (App. C, App. 23, 24)

STAGE OF PROCEEDINGS WHERE FEDERAL QUESTION FIRST RAISED

The federal question pertaining to the right of comment in the instance of allegedly "public figures" was first raised in this cause in the Answer to Amended Complaint for Libel and Slander filed in the trial court:

SIXTH DEFENSE

> " * * * The Words complained of were made without malice on the activities of the Plaintiff as a public person or official and are conditionally privileged and constitute fair comment."

The issue remained present throughout the original trial, the first appeals in this cause, and the second trial and appeals. The determinative factor in the decision now before this court was the interpretation and evaluation of what constitutes "actionable libel" and proof thereof with "convincing clarity" as set forth in the Opinions of this court interpreting the provisions of state statutes governing libel and slander in light of the guarantees of free speech and free press under the United States Constitution and Amendments thereto.

The decisive factor in the litigation was the interpretation and application of the cited decisions of this court interpreting federal constitutional rights and privileges as applied to Florida Statutes governing libel and slander. The gist of Petitioner's complaint here is the *District Court misinterpreted and misapplied decisions of this court interpreting federal constitutional provisions.*

The substantial federal question has been the issue in this cause since the original pleadings and was the determinative factor in the eventual result reached by each court which has considered the matter.

REASONS FOR GRANTING THE WRIT

The District Court of Appeal of Florida in relying upon and applying the opinions of this court in *Rosenbloom v. Metromedia, supra, St. Amant v. Thompson, supra, and New York Times v. Sullivan, supra,* misinterpreted and misapplied the law as pronounced by this court in those decisions and reached a conclusion contrary to that reached by this court in legally similar situations concerning the applicable provisions of the constitutional right of free speech in relation to comment upon public figures or officials.

Secondly, the District Court of Appeal improperly extended the right of comment on the actions of a "public figure" (assuming arguendo the publisher of a small weekly newspaper can be a "public figure" under the facts and circumstances shown in this Petition and Appendix) to include remarks made by a private individual to a selected group (a Rotary Club) not for dissemination to the general public and which were in support of the business interests of the person making the statement or his corporate employer.

Particularly would this be true when the private individual making the statements alleged to be libelous against this Petitioner made such statements to this private select group and the statements were, as pointed out in the opinion by the District Court of Appeal, "*erroneous, inaccurate, and negligently made.*" (App. C, App. 22)

The individual Respondent, Defendant below, who made the actual statements complained of and subsequently had them printed and mailed out to a select, captive audi-

ence of telephone subscribers of the corporate Defendant, of which he was the President, made statements which were admittedly erroneous, and they were made by this individual *who would by reason of his position as President of the telephone company have access to the actual facts and would be a person upon whose opinion the general public would necessarily rely as to truth and accuracy because of the position occupied by the Defendant and his access to the factual information which he erroneously reported.*

The District Court admitted the *erroneous, inaccurate and negligent nature of these factual statements* made by this individual Respondent acting on behalf of the corporate Respondent and, *when a trial jury twice concluded such inaccurate factual statements were made with actual malice by a person who knew them to be false or should by reason of his position have such knowledge,* the District Court concluded as a matter of law the jury's findings should be disregarded.

The District Court in its Opinion said:

> "Gibson erroneously represented the statistics of telephone subscribers in Apalachicola when he stated that the number of subscribers in the Apalachicola exchange was reduced by 74 by not explaining at the same time that the telephone company had transferred those telephones from the Apalachicola exchange to the newly established telephone exchange across the bay at East Point. Thus, his statement was erroneous, inaccurate, and negligently made." (App. C, App. 22)

The statement made and circulated by this private individual acting on behalf of his corporate employer asserted a loss of telephone subscribers in a particular exchange and then attributed this loss in direct, positive and unequivocal terms to this Petitioner and his activities as publisher of a local newspaper.

Respondent GIBSON said and subsequently had printed and mailed out to a selected audience:

> "Now, I shall take Apalachicola: Our exchange there in the year 1964 lost 74 telephones — only exchange that we have that showed any loss in telephones — and, in my opinion, this loss can be attributed largely to the local newspaper in Apalachicola and its publisher, who seems to take pleasure in berating and abusing any business interest in his community, including the larger taxpayers in his County; * * *;" (App. C, App. 15)

The statement was at all times false and this Defendant had to know this for he was the president of the telephone company. He admitted he was aware of the opening of a new exchange and the transfer of subscribers to that exchange from the Apalachicola exchange. (App. C, App. 15 & 22)

At no time has any decision of this court, including the decisions relied upon by the District Court of Appeal, ever extended to or made immune from prosecution for damages a *private individual who makes admittedly erroneous and inaccurate factual statements* where he by reason of his position as president of the company involved would have first-hand knowledge of the accurate facts

and would be expected by the general public to speak the truth, when such statements are made not in the pressure of time of public broadcasting or news reporting but in a prepared speech delivered before a selected, private group and subsequently printed and mailed out to a captive audience of telephone company subscribers who had not requested such information but would be expected to believe in its accuracy because of its source.

Certainly, a jury question is presented *in every instance where the statements made are admittedly false* and the issue presented for jury determination would be whether there was *actual malice* in the making of such statements. The jury found this to be true.

The circumstances reflected in the opinion in this cause show the antagonistic position occupied by the individual Respondent and his corporate employer toward the Petitioner, who is the weekly newspaper publisher in the community. There can well be implied a converse antagonistic attitude by the publisher toward Respondents, but in no decision of this court has the defense of contributory negligence ever been held to be a complete defense to a proven claim of inaccurate statements made, as determined by this jury, with actual malice.

The District Court of Appeal misinterprets the decisions of this court and superimposes upon them a privilege they extend to a private individual covering remarks made to a select, private group whereas *all decisions of this court have been predicated upon the right of the general public to have before it for consideration items which might be considered of current interest if disseminated in the public interest.*

In no decision of this court has the privilege of free speech ever been extended so far as to allow a private individual to libel another private individual and then claim *"public figure"* or set up as a defense that the private individual has also been guilty of libel and inaccurate statements against the speaker or his corporate employer and therefore no cause of action exists between either party. This eliminates the fact each statement could have different consequences, to be determined by one or more juries.

The District Court of Appeal in its Opinion justified the misstatements and malicious conduct of these Respondents by indicating this Petitioner has "published inaccurate statements about the duPont interests and is likewise inescapable from this record." (App. C, App. 22) This may give the duPont interests a cause of action, but it does not give them a license to make false statements about Petitioner or constitute a total defense to false statements made by them.

A comparison of the Opinion and conclusion in the instant case with the law as pronounced by this court in previous decisions heretofore referred to *reaches the inescapable conclusion the court over-extended the doctrines which this court had pronounced and reached an erroneous conclusion in this instance.*

A lengthy discussion of the right of a free press under federal constitutional safeguards appears in Mr. Justice Brennan's opinion in *Rosenbloom v. Metromedia.* This discussion concludes with this restriction on application of the right of free press as guaranteed to news media by reason of their duty to disseminate matters of interest to the members of the general public:

> *"Calculated falsehood, of course, falls outside 'the fruitful exercise of the right of free speech.'* Garrison v. Louisiana, 379 U.S. 64, 75, 13 L.Ed 125, 133, 85 S.Ct. 209 (1964)." (Op. 317) (Emphasis Supplied)

In the ROSENBLOOM case, this court was faced with interpretation of state libel laws (Pennsylvania) in light of federal constitutional guarantees of free speech and free press. In the instant case, we have the same situation with the issue being the application of state libel laws (Florida) in light of federal constitutional guarantees of free speech *as they may apply to a private individual addressing a select, private club.*

Relative to the significant difference in application of the free speech and free press privilege of the United States Constitution when applied to public media disseminating news to the general public as distinguished from a private individual or corporation disseminating private subscription credit reports or other information to select groups, the Circuit Court of Appeals of the Tenth Judicial Circuit in the case of

> KANSAS ELECTRIC SUPPLY COMPANY
> V. DUN & BRADSTREET, INC.
> (CCA 10, 1971) 448 F.2d 647
> (Cert. denied U. S. Supreme Court
> March, 1972, 92 S.Ct. 1289),

held the "public figure" privilege and the "New York Times doctrine" did not apply to private subscription credit reports or to private individuals or publications which did not disseminate news of general interest for

consideration by the public. See also *C. R. Grove, et al. v. Dun & Bradstreet, Inc.*, (CCA 10, 1971), 448 F.2d 647.

There is obviously a different application of free speech when a private individual is making a speech to a select, private group, which speech can from the circumstances surrounding the delivery of the address and content thereof be construed as furthering the aims of the corporate employer to discredit the publisher of the local weekly newspaper, than govern the circumstances present in the cases relied upon by the District Court to support its conclusions and results.

This must necessarily be inherent in the award by two juries of compensatory damages in a substantial amount against the individual and corporate Defendant and a $20,000 award of punitive damages against the corporate Defendant.

Petitioner has obviously been denied his rights under the First, Seventh and Fourteenth Amendments to the United States Constitution by the erroneous extension of the doctrines enunciated in decisions of this court by the District Court in attempting to support a conclusion contrary to that reached in decisions of this court.

Consideration by this court of the decision now before it for review will show a *prima facie* case for the issuance of the Writ of Certiorari in this cause. This Petitioner is without relief in any other forum for the only act remaining to be done is the ministerial act of the entry by the trial court of a Judgment in favor of these Respondents as directed by the District Court of Appeal of Florida.

NONE OF THE CASES RELIED UPON BY THE DISTRICT COURT INVOLVE FACTS WHERE A PRIVATE INDIVIDUAL IS CLAIMING RIGHT OF FREE COMMENT IN A SPEECH MADE TO A PRIVATE GROUP AND IN NONE OF THE CITED CASES WAS THERE AN INSTANCE OF AN ADMITTEDLY "*ERRONEOUS, INACCURATE, AND NEGLIGENTLY MADE*" FACTUAL ASSERTION BY A PERSON WHO BY REASON OF HIS POSITION WOULD BE CHARGED WITH KNOWLEDGE OF THE TRUTH OR FALSITY OF SUCH FACT.

Petitioner now seeks an Order of this court quashing the decision of the District Court of Appeal of Florida and reinstating the judgment based on the jury verdict returned in the Circuit Court of Franklin County, Florida, following the third trial of this cause.

CONCLUSION

Misinterpretation and misapplication of the libel laws of the State of Florida in light of the decisions of this court denies Petitioner his right to trial by jury and his right to seek relief for libel and slander, all contrary to the provisions of the First, Seventh and Fourteenth Amendments to the Constitution of the United States.

Such denial of right to trial by jury and denial of right of redress is purportedly predicated upon and supported by decisions of this court which are set forth in the cited opinion.

Petitioner seeks relief from this court in having the decision of the District Court of Appeal of Florida quashed and the verdict and judgment reinstated.

Respectfully submitted,

J. BEN WATKINS of
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P. O. Drawer 1814
Tallahassee, Florida
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I certify copy of the foregoing Petition for Writ of Certiorari was furnished Isler, Welch, Bryant, Smith & Higby, 434 Magnolia Avenue, Panama City, Florida, attorneys for Respondents, this _____ day of _____, 1973.

_____